Agi ak Bungkong & Ors v Ladang Sawit Bintulu Sdn Bhd & Ors

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B

HIGH COURT (KUCHING) — NO 22–93 OF 2001-III(I)
DAVID WONG J
21 JANUARY 2010

C

Civil Procedure — Discovery — Failure to give full discovery — Defendants' failure to disclose crucial photographs to plaintiff at earliest opportunity — Whether photographs ought to be admitted as evidence

D

Civil Procedure — Representative action — Requirements — 'Same interest' — Representative claim for native customary rights — Whether plaintiffs to first establish such rights before bringing action

E

Evidence — Custom — Existence of right or custom — Approach of court when determining aboriginal and/or native rights or custom

F

Land Law — Customary land — Claim of — Whether native customary title recognised under Malaysian common law — Whether necessary for natives to establish native customary rights under the Land Code

G

Land Law — Customary land — Proof of custom — Pemakai menua — Approach of court when determining aboriginal and/or native rights or custom

H

Legal Profession — Duty to court — Duty of counsel to ensure all relevant documents disclosed to opposing party at earliest opportunity — Duty of counsel to ensure case disposed of timeously — Whether late disclosure of crucial documents constituted a breach of such duties — Whether breach of such duties ought to be punished

I

Native Law and Custom — Land dispute — Native title — 'Pemakai Menua' — Whether recognised by law — Whether native customary title recognised under Malaysian common law — Native title, determination of

The fifth defendant, through the fourth defendant, granted two leases over certain land ('the defendants' parcel') to the second and third defendants. The

plaintiffs claimed that their land was within the defendants' parcel. The plaintiffs brought the instant action claiming, inter alia, native customary rights ('NCR') over their land within the defendants' parcel. At the trial, the defendants submitted, inter alia, that the plaintiffs' representative action was in fact a trespass action and could only be brought after the plaintiffs had first established NCR. The plaintiffs on the other hand objected to the admission of certain aerial photographs tendered by the defendants on the basis that the photographs had not been supplied to the plaintiffs during discovery.

Held, allowing the plaintiffs' action with costs:

(1) All that O 15 r 12 of the Rules of the High Court 1980 ('RHC') requires is that the existence of 'same interest' in a representative proceeding. In the instant case, the plaintiffs and the persons they represented all shared a same interest in claiming for NCR land at their respective communities. There was no requirement for NCR to be first established as contended by the defendants. In any event, the defendants ought to have raised the issue as a preliminary issue as it could have determined the outcome of the case (see paras 5–7).

(2) The defendants' argument that the plaintiffs had to establish that their native customary rights were recognised by the Land Code and not under common law was contrary to the Federal Court decision in *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677. Malaysian common law recognises native customary title (see para 9); *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 (FC) followed.

(3) The Iban custom of 'Pemakai Menua' is indeed recognised in law notwithstanding its non-listing in the Adat Iban 1993 – a codification of Iban custom and practice — or in any of the statutes. Native title requires an examination of the customs and practices of each individual community. This involves a factual inquiry and not merely considering whether the customs appear in the statute book (see para 15); *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 followed.

(4) Aboriginal rights are sui generis and require a unique approach to the treatment of evidence. The courts should approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims and should interpret the evidence in the same spirit. Natives are the original inhabitants of Malaysia and to treat NCR claims by looking at them from the point of ownership of the lands is not entirely correct. The claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and

rivers (see paras 18 & 20); *Mason v Tritton* (1994) 34 NSWLR 572 followed; *Delgamuuk v British Columbia* (1997) 3 SCR 1010 (SC) and *Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524 followed.

(5) The oral evidence of the independent witnesses and the documentary evidence had corroborated the plaintiffs' case. The plaintiffs' evidence was thus credible (see para 63); *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 followed.

(6) Order 24 of the RHC requires parties to make mutual discovery of relevant documents in their possession after the close of pleadings. The instant case was a 2001 case and the trial only commenced in 2008, leaving the parties some six years to exchange the documents in their possession. The defendants' aerial photographs were not only relevant but crucial to both the defendants' and plaintiffs' case. The defendants' aerial photographs were documents that ought to have been disclosed to the plaintiffs at the earliest opportunity. Counsel were duty bound to their clients and the court to ensure that all relevant documents were disclosed to the opposing party at the earliest opportunity. In the instant case, the defendants' counsel by not disclosing the photographs until the very last moment had breached their duty to ensure the case was disposed off in a timely manner, and could not be left unpunished. They had deprived the plaintiffs the opportunity to analyse the photographs which no doubt had prejudiced their case. The High Court would thus rule that the aerial photographs ought not to be taken into account in deliberations (see paras 68, 72, & 75–76); *Cropper v Smith* (1884) 26 Ch D 700 referred; *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 referred; *Aon Risk Services Australia Limited v Australian National University* (2009) HCA 27 followed.

(7) The defendants' counsel had also failed to lay any foundation as to how the photographs came into existence. They had not established the authenticity of the aerial photographs. In any event, the NCR in the instant case was created by the 'Pemakai Menoa' custom. Thus the use of aerial photographs do disprove the NCR claims was inadequate (see paras 77–78).

[Bahasa Malaysia summary

Defendan kelima, melalui defendan keempat, telah memberikan dua pajakan ke atas tanah tertentu ('bidang tanah defendan-defendan') kepada defendan-defendan kedua dan ketiga. Plaintif-plaintif telah mendakwa bahawa tanah mereka berada dalam bidang tanah defendan-defendan. Plaintif-plaintif telah memulakan tindakan ini menuntut, antara lain, hak-hak adat anak negeri ('HAAN') ke atas tanah mereka dalam bidang tanah defendan-defendan. Semasa perbicaraan, defendan-defendan telah berhujah,

antara lain, bahawa tindakan representasi plaintif-plaintif sebenarnya adalah tindakan pencerobohan dan hanya boleh dimulakan selepas plaintif-plaintif terlebih dahulu membuktikan HAAN. Plaintif-plaintif sebaliknya membantah terhadap kemasukan gambar-gambar foto aerial tertentu yang telah ditenderkan oleh defendan-defendan atas dasar bahawa gambar-gambar foto tersebut tidak diberikan kepada plaintif-plaintif semasa penemuan.

Diputuskan, membenarkan tindakan plaintif-plaintif dengan kos:

(1) Apa yang A 15 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') hanya menghendaki bahawa kewujudan 'same interest' dalam prosiding representasi. Dalam kes ini, plaintif-plaintif dan individu yang mereka wakili mempunyai kepentingan yang sama menuntut HAAN ke atas tanah dalam komuniti mereka masing-masingnya. Tiada keperluan untuk HAAN terlebih dahulu dibuktikan sepertimana ditegaskan oleh defendan-defendan. Dalam apa keadaan, defendan-defendan sepatutnya telah menimbulkan isu tersebut sebagai isu awalan kerana ia mungkin boleh menentukan keputusan kes tersebut (lihat perenggan 5–7).

(2) Hujah defendan-defendan bahawa plaintif-plaintif telah membuktikan bahawa hak-hak adat anak negeri mereka diiktiraf oleh Kanun Tanah dan bukan di bawah *common law* bertentangan dengan keputusan Mahkamah Persekutuan dan kes *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677. Common law di Malaysia mengiktiraf hak milik adat anak negeri (lihat perenggan 9); *Superintendent of Land & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the Estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677 diikut.

(3) Adat 'Pemakai Menua' Iban sememangnya dikenali dari segi undang-undang meskipun ianya tidak disenaraikan dalam Adat Iban 1993 — pengkanunan adat dan amalan Iban — atau dalam mana-mana statut. Hak anak negeri memerlukan milik pemeriksaan adat dan amalan setiap satu komuniti. Ini melibatkan siasatan faktual dan bukan hanya mempertimbangkan sama ada adat itu terdapat dalam buku statut (lihat perenggan 15); *Nor anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 diikut.

(4) Hak-hak orang asli adalah sui generis dan memerlukan pendekatan unik bagi mengolah keterangan. Mahkamah sepatutnya menggunakan peraturan keterangan berdasarkan kesukaran memperoleh bukti yang sedia ada dalam mengadili tuntutan orang asli dan sepatutnya mentafsirkan keterangan itu dengan cara yang sama. Anak negeri merupakan penduduk asal Malaysia dan untuk menganggap tuntutan HAAN dengan melihat mereka dari sudut ketuanpunyaan tanah adalah

tidak benar sepenuhnya. Tuntutan tersebut sepatutnya dilihat sebagai konsep di mana anak negeri merupakan sebahagian daripada tanah sepertimana terdapatnya pokok, gunung, bukit, haiwan, ikan dan sungai (lihat perenggan 18 & 20); *Mason v Tritton* (1994) 34 NSWLR 572 diikut; *Delgamuuk v British Columbia* (1997) 3 SCR 1010 (SC) dan *Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524 diikut.

(5) Keterangan lisan saksi-saksi bebas dan keterangan dokumentar telah menyokong kes plaintif-plaintif. Keterangan plaintif-plaintif dengan itu boleh dipercayai (lihat perenggan 63); *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 diikut.

(6) Aturan 24 KMT menghendaki pihak-pihak membuat penemuan bersama tentang dokumen-dokumen dalam milikan mereka. Gambar-gambar foto aerial defendan-defendan bukan sahaja relevan tetapi penting untuk kedua-dua kes defendan-defendan dan plaintif-plaintif. Gambar-gambar foto aerial defendan-defendan adalah dokumen-dokumen yang sepatutnya diberikan kepada plaintif-plaintif pada peluang terawal. Peguam mempunyai kewajipan terhadap anak guam mereka dan mahkamah bagi memastikan bahawa kesemua dokumen-dokumen yang relevan telah diberikan kepada pihak yang menentang pada peluang terawal. Dalam kes ini, peguam defendan-defendan yang tidak memberikan gambar-gambar foto itu sehingga saat terakhir telah melanggar kewajipannya bagi memastikan kes itu selesai dalam masa singkat, dan tidak boleh dibiarkan tanpa hukuman. Mereka telah menafikan plaintif-plaintif peluang untuk menganalisis gambar-gambar foto tersebut yang tanpa diragui telah memprejudiskan kes mereka. Mahkamah Tinggi dengan itu memutuskan bahawa gambar-gambar foto aerial tersebut tidak sepatutnya diambilkira dalam pertimbangan (lihat perenggan 68, 72, & 75–76); *Cropper v Smith* (1884) 26 Ch D 700 dirujuk; *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 dirujuk dan *Aon Risk Services Australia Limited v Australian National University* (2009) HCA 27 diikut.

(7) Peguam defendan-defendan juga telah gagal untuk meletakkan apa-apa asas tentang bagaimana gambar-gambar foto tersebut wujud. Mereka tidak membuktikan ketulenan gambar-gambar foto aerial tersebut. Dalam apa keadaanpun, HAAN dalam kes ini wujud daripada adat 'Pemakai Menoa'. Oleh itu penggunaan gambar-gambar foto aerial sememangnya membuktikan tuntutan HAAN adalah tidak mencukupi (lihat perenggan 77–78).]

Notes

For a case on proof of custom, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2844.

A For cases on claim of customary land, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2834–2836.

For cases on custom in general, see 7(1) *Mallal's DIgest* (4th Ed, 2010 Reissue) paras 1177.

B For cases on duty of court in general, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1664–1666.

For cases on failure to give full discovery, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2477–2478.

C For cases on native title, see 10 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 670–672.

For cases on requirements, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5976–5980.

D **Cases referred to**

Aon Risk Services Australia Limited v Australian National University (2009) HCA 27, HC (folld)

Cropper v Smith (1884) 26 Ch D 700, CA (refd)

E *Delgamuuk v British Columbia* (1997) 3 SCR 1010, SC (folld)

Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524, HC (folld)

Karthiyayani & Anor v Lee Leong Sin & Anor [1975] 1 MLJ 119, FC (folld)

F *Mason v Tritton* (1994) 34 NSWLR 572, CA (folld)

Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors [2001] 6 MLJ 241, HC (folld)

Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146, HC (refd)

G *Superintendent of Lands & Surveys Miri Division & Anor v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2 MLJ 677; [2007] 6 CLJ 509, FC (folld)

Legislation referred to

H Adat Iban 1993
Federal Constitution art 160(2)
Rules of the High Court 1980 O 15 r 12, O 24
Sarawak Land Code 1958 (Cap 81) s 2(a)

I *See Chee How (Baru Bian & Co Advocates) for the plaintiffs.*

Fatmawaty bt Morshidi (Hamzah & Ong Advocates) for the first, second and third defendants.

Fam Boon Kim (State Legal Officer, Attorney General's Chambers) for the fourth and fifth defendants.

David Wong J:

PROCEEDINGS

[1] The plaintiffs, Iban by race, claim for native customary rights on lands as residents of the longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak. The exact location of their claim is as set out in the map annexed to statement of claim marked 'M' and edged yellow.

[2] The defendants deny the existence of such claims and in substance puts the plaintiffs to strict proof.

BACKGROUND FACTS

[3] Two provisional leases over Lot 2 Block 4 Selezu Land District and Lot 2 Block 34 Kemena Land District located in Bintulu were issued to the second and third defendants by the fifth defendant through the fourth defendant. The first defendant is a joint venture company of the second and third defendants. The lands upon which the plaintiffs claim for native customary rights are within the parcel of land of the two provisional leases, hence giving rise to this claim for declaration by the plaintiffs that they possess native customary rights ('NCR') on part of the provisional leases.

ISSUES

[4] From the pleadings, evidence adduced and submissions of respective counsel, the determinative issues for the court are these:

(a) Whether the plaintiffs can maintain this representative action?

(b) Whether the plaintiffs have established native customary rights over the lands as set out in map annexed to the statement of claim?

ISSUE (a)

Whether the plaintiffs can maintain this representative action?

[5] Counsel for the defendants submitted that this claim though couched in 'native customary right' terminology is in fact a trespass action and as such the plaintiffs must establish that they have native customary rights first. With respect to counsel, I am not quite sure about what they are saying. The relevant provision in the High Court Rules is O 15 r 12 which reads as follows:

A Rule 12 Representative proceedings (O 15 r 12)

(1) Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and, unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

(2) At any stage of proceedings under this rule the Court may, on the application of the plaintiff, and on such terms, if any, as it thinks fit, appoint any one or more of the defendants or other persons as representing whom the defendants are sued to represent all or all except one or more, of those person in the proceedings; and where, in exercise of the power conferred by this paragraph, the Court appoints a person not named as a defendant, it shall make an order under rule 6 adding that person as a defendant.

[6] From my reading of the rule, all it requires is that there exists a 'same interest' and in this proceeding the plaintiffs and the others whom they are representing share a same interest in claiming for native customary rights land at the Longhouse communities of Selezu, Setulai and Sepadok of Sebauh District, Bintulu, Sarawak. The rule does not stipulate that NCR must be established first, as submitted by counsel for the defendants. Accordingly, I reject the submission of counsel for the defendants.

[7] Before I deal with issue (b), let me state that counsel for the defendants should have raised issue (a) as a preliminary issue instead of raising it after full trial of the case as this issue could have determined the fate of this case.

ISSUE (b)

Whether the plaintiffs have established native customary rights over the lands as set out in the map annexed to the statement of claim?

[8] The plaintiffs' case is premised on s 2(a) of the Sarawak Land Code (Cap 81) 1958 which defines 'native customary land' to mean:

(a) land in which native customary rights, whether communal or otherwise, have lawfully been created prior to the 1 January 1958, and still subsist as such.

[9] What that means, according to counsel for the defendants, is that the plaintiffs must establish that their native customary rights over the lands are recognised by the Land Code and not under common law. With respect, that view is contrary to the recent Federal Court decision in *Superintendent of Lands & Surveys Miri Division and Government of Sarawak v Madeli bin Salleh (suing as administrator of the estate of the deceased, Salleh bin Kilong)* [2008] 2

MLJ 677; [2007] 6 CLJ 509, which held that common law of Malaysia recognises native customary title. This is what the Federal Court through the judgment of Arifin Zakaria FCJ (as he then was, now CJM) said:

> [21] The learned State attorney general vehemently contended that *Adong* and *Nor Anak Nyawai* should not be followed because they were decisions rooted upon the Australian case of *Mabo (No 2)*, an authority for the proposition that the common law of Australia which recognises a form of 'native titles' and the Canadian case of *Calder v AG of British Columbia* which held that the 'common law categorically recognised native rights over land'.
>
> [22] With respect, we are of the view that the proposition of law as enunciated in these two cases reflected the common law position with regard to native titles throughout the Commonwealth. And it was held by Brennan J, Mason CJ and McHugh J, concurring, in *Mabo (No 2)* that by the common law, the Crown may acquire a radical title or ultimate title to the land but the Crown did not thereby acquire absolute beneficial ownership of the land. The Crown's right or interest is subject to any native rights over such land. They adopted the view of the Privy Council in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399, where the Privy Council in an appeal from the Supreme Court of Nigeria held that the radical title to land held by the White Cap Chiefs of Lagos is in the Crown, but a full usufructuary title vests in a chief on behalf of the community of which he is head. That usufructuary title was not affected by the cession to the British Crown in 1861; the system of Crown grants must be regarded as having been introduced mainly, if not exclusively, for conveyancing purposes. At p 407 Viscount Haldane observed:
>
> > In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives. In the case of *Oduntan Onisiwo v Attorney-General of Southern Nigeria (2)* decided by the Supreme Court of the colony in 1912, Osbourne CJ laid down as regards the effect of the cession of 1861, that he was of the opinion that 'the ownership rights of private landowners, including the families of the Idejos, were left entirely unimpaired, and as freely exercisable after the cession as before.' In this view Their Lordships concur. A mere change in sovereignty is not to be presumed as meant to disturb rights of private owners; and the general terms of a cession are prima facie to be construed accordingly. The introduction of the system of Crown grants which was made subsequently must be regarded as having been brought about mainly, if not exclusively, for conveyancing purposes, and not with a view to altering substantive titles already existing. No doubt questions of difficulty may arise in individual instances as to the effect in law of the terms of particular documents. But when the broad question is raised as to what is meant by the provision in the Public Lands Ordinance of 1903, that where the lands to be taken are the property of a native community, the head chief may sell and convey it, the answer must be that he is to convey a full

native title of usufruct, and that adequate compensation for what is so conveyed must be awarded for distribution among the members of the community entitled, for apportionment as the native council of the district, with the sanction of the governor, may determine. The chief is only the agent through whom the transaction is to take place, and he is to be dealt with as representing not only his own but the other interests affected.

[23] We are conscious of the fact that in this case we are dealing with individual right not communal right, but in our view the principle applicable is the same.

[10] What concerns the court now is whether the plaintiffs have proved on the balance of probability that they have NCR on the lands prior to 1958.

[11] From the submissions of counsel for the plaintiffs, it is clear that the plaintiffs are claiming NCR on the lands through the Iban custom of 'Pemakai Menua' to which the defendants contend that this custom is not recognised in law. As this is substantially a legal issue I shall now deal with it. 'Pemakai Menua' is defined by Mr Nicholas Bawin ak Anggat — PW17 as this:

3. In the past, when pioneering families of Iban opened a virgin forest area, they would perform an important ritual known as panggul menua. It was only after the ceremony was first performed that the first cutting of virgin forest for settlement and farming could commence. From then onward, the community can established its rights to the felled area, and forest within the general area, as their pemakai menua (also spelt a menoa) or communal land.

4. Pemakai menua encompasses an area of land held by a district longhouse or village community, and includes farms, garden, fruit groves, cemetery, water and forest within a defined boundary (garis menua). Pemakai menua also includes temuda (cultivated land that have been left to fallow), tembawai (old longhouse sites), and pulau (patches of virgin forest that have left uncultivated to provide the community with forest resources for domestic use).

[12] This is also explained by Empeni Lang ('PW9'), a retired civil servant who had served in the government service as Sarawak administrative officer, resident and chief registrar of the native court, as this:

Q You explained Pemakai Menua as territorial resource and then you explained Temuda rights as right to the NCR land. Can you be more specific of the difference between Pemakai Menua and the Temuda rights?

A Pemakai Menua is the geographical extent of the territory of each longhouse. Within this specific area, there exist NCR rights to land like Temuda that is farming land, cultivation such as rubber garden, fruit trees, burial grounds, longhouse sites and ex-longhouse i.e. Tembawai, forest islet or pulau inclusive of Pulau Galau, Pulau Mali that is all reserve or all forest stands created under custom. The purpose of this pulau is to be a source of trees for domestic use, such as timber, rottan, material for padi bins (made of the tree barks, fashioned in a circular manner to contain padi after harvest), and material for making boats. This Pemakai Menua is inclusive of forest are also sources of collection of jungle produce such as fern, bamboo shoots and other edible produce. This Pemakai Menua defines the jurisdiction of each Tuai Rumah and it is this jurisdiction that is the extent of the local jurisdiction of Tuai Rumah as defined or implied under Section 7 of the Native Court Ordinance 1992. Without the concept of Pemakai Menua, there would be no clear definition and extent of the local jurisdiction of the Tuai Rumah as the presiding officer of the headman Court in the Native Court system.

Q What about Temuda?

A Temuda is held under NCR. It is created under Section 5 (2) of the Land Code i.e. it must be created before 1st January 1958 by way of clearing and occupation, by way of planting and cultivation or under Section 10 of the Land Code, that is last time it was approved by the District Officer but now approve by the Superintendent of Lands & Surveys and by way of communal reserve, approve by the minister. This NCR land was created by way of felling of the primary forest by the original workers of our ancestors and the rights of use is transferred to subsequent generation as its name suggest, it is an untitled land which could be lost in the manners that I had mentioned earlier i.e. non-user, unauthorized migration, abandonment and extinguishment. It is a common practice under the custom of shifting cultivation for this Temuda land to remain idle in accordance of fallow system use to maximize land fertility and enhancing maximum use. The length of this idle period within the fallow system is contingent on the nature of the fertility of the land. The more fertile the land is, the shorter will be the idle period. The less fertile the land is, the longer will be the idle period.

Q You just described the creation of Temuda under the civil laws. Does the Iban's custom and tradition allow the creation of Temuda?

A Yes, in fact the creation of Temuda or NCR land are created under custom, that is it was created by our ancestors prior to 1st January 1958. That is why in the land code 1958 (Cap. 81) Section 5 (2) (f), says any other lawful means. The definition of customary law is custom or body of custom to which the law of Sarawak gives effect (Section 2 of the Native Court Ordinance 1992).

Q Are you aware if there is or are instances of longhouses sharing the same Pemakai Menua?

A Yes, it is quite common. This happened when the first pioneer longhouses started with one longhouse. Subsequently, because of the increase of the number of 'bilik' or 'bilik' families it is quite natural and normal for the people to build a new longhouse or additional longhouses. Hence from the original one longhouse, they may build more longhouses. As I said earlier, the Pemakai Menua or the extent of

Pemakai Menua is determined by the ritual ceremony of Panggol Menua. The original longhouse and the consequent longhouses will therefore share the same territorial resource area.

[13] This evidence has not been rebutted by the defendants or rather no attempt was made to dispute that evidence, hence I have no hesitation in accepting their evidence. Furthermore PW17, in my view, can be accepted as an expert on the Iban custom and practice in view of his term as the Deputy President of the Majlis Adat Istiadat Sarawak since 12 August 1992 until February 2005 and had access to documents and records on Iban customs and practices. His appointment as Deputy President of Majlis Adat Istiadat Sarawak can be treated by the court as an acknowledgment of his expertise by the state government. PW9's evidence should not be doubted as well in view of his many years of experience in the government service.

[14] Accordingly, I have no hesitation in holding 'Pemakai Menua' an Iban custom and practice.

[15] However counsel for the defendants contends that as 'Pemakai Menua' is not listed in the Adat Iban 1993 codification of Iban customary custom and practice or in any of the statutes (which is not disputed) and hence not recognised by statue, the law should not give recognition to it or used by the court to confer NCR on the lands. The same argument was made by the then learned state attorney general in *Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 6 MLJ 241 which was rejected by both the High Court and Court of Appeal. Both courts held that native title requires an examination of the customs and practices of each individual community and this involves a factual inquiry and not whether the customs appear in the statute book. This view is consistent with the intention of Federal Constitution as native customs are accorded the status of law under art 160(2) of the Federal Constitution which defines law to include 'custom or usage having the force of law in the Federation or any part thereof'. In that case the view of the Court of Appeal differs from the High Court only in respect of the factual evaluation of evidence in which they found that the plaintiffs there had failed in proving 'Pemakai Menua' in the disputed area.

[16] Accordingly, I reject counsel for the defendants' contention that there cannot be NCR unless the same is embodied in statutes.

[17] This brings me back to the primary issue of proof by the plaintiffs. The first matter which needs my attention is the approach in dealing with proof of NCR. Kirby P (as he then was) sitting as the President of the Court of Appeal of the New South Wales Supreme Court in *Mason v Tritton* (1994) 34 NSWLR 572 at p 588 observed that:

> In the nature of aboriginal society, their many deprivation and disadvantages following European settlement of Australia and the limited record keeping of the earliest days, it is next to impossible to expect that aboriginal Australians will ever be able to prove, by record details, their presence genealogy back to the time before 1788. In these circumstances, it would be unreasonable and unrealistic for the common law of Australia to demand such proof for the establishment of a claim to native title. The common law, being the creation of reason, typically rejects unrealistic and unreasonable principles.

[18] In *Delgamuuk v British Columbia* (1997) 3 SCR 1010, Lamer CJ had this to say on the appropriate approach in dealing with proof of aboriginal claims and I quote:

> In cases involving the determination of aboriginal rights, appellate intervention is also warranted by the failure of a trial court to appreciate the evidentiary difficulties inherent in adjudicating aboriginal claims when, applying the rules if evidence and, second interpreting the evidence before it. As I said in *Van der Peet* at p 68:
>
> > In determining whether an aboriginal claimant has produced evidence sufficient to demonstrate that her activity is an aspect of a practice, custom or tradition integral to a distinctive aboriginal culture, a court should approach the rule of evidence, to interpret the evidence that exists, with a consciousness of the special nature of aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law tots case.

The justification for this special approach can be found in the nature of aboriginal rights themselves. I explained in *Van der Peet* that those rights are aimed at the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory. They attempt to achieve that reconciliation by 'their bridging of aboriginal and non aboriginal cultures' (at para 42). Accordingly 'act must take into account the perspective of the aboriginal people claiming the right … while at the same time taking into account the perspective of the common law' such that 'true reconciliation will, equally, place weight on each' (at paras 49–50).

In other words, although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain 'the Canadian legal and constitutional structure' (at para 49). Both the principles laid down in *Van der Peet* — first that trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit — must be understood against this background.

[19] Similar sentiments can be seen in the local case of *Hamit bin Matusin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524, where Haidar bin Mohd Nor J (as he then was) had at p 1526 (para G right) said as follows:

> In respect of native custom, s 48 of the Evidence act 1950 provides:
>
> 48. When the court has to perform opinion as to the existence of any general custom or right, the opinions as to the existence of such custom or right of persons who would be likely to know of its existence, if it existed, are relevant.
>
> *Cross on Evidence (Third Australia Ed)* listed four ways in which the existence of customs or usage may be proved. One of these four methods which is relevant to the present actions is stated as follows:
>
> > The first method consists of the testimony of a witness who deposes, from his own personal knowledge, to the actual existence of custom or usage. He states that he is well aware of the facts that lessees in a given locality have been in the habit of removing 'way going crops' that is crops grown by the tenant before the termination of his lease or of any other custom or usage. The evidence may be based on observation of many instances, and it may sometimes be based on reputation or hearsay.

[20] I have no doubt the above principles are correct in law and I will now examine the evidence based on them. Let me also add that natives are the original inhabitants of the country and to treat claims for NCR by looking at it only from the point of ownership of the lands by the natives is not entirely correct. These claims should be looked at with the concept that the natives are part of the land as are the trees, mountains, hills, animals, fishes and rivers. My basis for saying this is simple. Prior to the arrival of white settlement there was no system of land ownership as we have now. There was no food processing factory then and they survived by foraging the land. The fruits on the wild trees, the fishes in the river, the wild boars and other animals on the land are their food for survival. It is not insignificant in this country that they are known as 'bumiputras'. It is my view that this concept must be kept at the forefront of our minds when dealing with native claims to lands.

THE PLAINTIFFS' CASE

[21] As this is a claim concerning three areas, I will deal with each of them separately.

(a) *Setulai longhouse communities*

[22] The present tuai rumah, Bilong ak Anssi ('PW1') of longhouse Rumah Bilong at Setulai, Sebauh, Bintulu was called as the first witness for the purpose of producing an agreement ('surat perjanjian') entered into between TR Bandang ak Pili and the Malay community at Sg Segam in the presence of the then district officer on 8 July 1946. The content of the agreement states as follows:

SURAT PERJANJIAN

Kami *TR Bandang Ak Pili* dan anak biak semua-nya (13) pintu, pada masa sekarang di *Sungai Segam Bintulu* telah mendapat hukuman daripada perentah berpendah balik ka menoa lama Sg. Setulai, Selezu, Sebauh apa bila habis jetam padi tahun dudi kelak ia-itu lebeh kurang bulan March/ April, 1947.

Sebab perentah telah menar kan memakai tanah bahagian Melayu Kg Puak, Bintulu sebenar pun dahulu telah di-benar kan oleh Jepon.

Jikalau Kami engkar daripada hukuman ini naschaya kami terkena da,awa oleh perentah

L.T.P

Tanda tangan

Tuai Rumah Bandang

Sgd

Sgd

District Officer

Bintulu

Date: 8th July 1946

[23] PW1's deceased grandfather (tuai rumah Bandang ak Pili) gave this document to him when he succeeded him as the tuai rumah. This document came about after the second world war when TR Bandang ak Pili and his followers were asked to move from Sg Segam back to Sg Setulai where they were asked to stay for three years during the Japanese occupation. The reason for moving out from Sg Segam was that the area belonged to the Malay community and that Sg Setulai was their home prior to moving to Sg Segam.

[24] By virtue of this document, it is the contention of the plaintiffs' counsel that TR Bandang ak Pili and his followers were asked to move back to Sg Setulai and to inherit the land there. In short, this document is the foundation of the plaintiffs' claim for NCR.

A **[25]** It is also the evidence of PW1 that the first defendant by developing and planting around the water catchments area had affected the Temuda of four longhouses, namely Rumah Bilong, Rumah Wilson, Rumah Unggan and Rumah Enteyar (now known as Rumah Bunyau) in that their water supply had been badly affected. This encroachment was made known to the B first defendant resulting in a meeting with representative of the first defendant. This meeting is evidenced in the form of letters from PW1 to the first defendant and oral testimony of the meeting between PW1 and the first defendant. I agree with counsel for the plaintiffs that these letters in pp 52–60 of exh A were never challenged.

C

[26] Naturally, the movement of PW1's grandfather and his followers was narrated to him by his grandfather. This is understandable and the fact that there is no written record should not be held against PW1 as at that particular time, they could not imagine that their NCR could be affected. In any event, D education and recording devices were scarce commodities.

[27] PW2, Herman Unjah ak Ramba, of Rh Bilong is the nephew of the late TR Bandang ak Pili and claimed to have knowledge of the history of the E longhouse community in Sg Setulai through his late grand uncle TR Bandang ak Pili who died in 1989 at the age of more than 90. His testimony, in so far as to the reasons of the late TR Bandang ak Pili and his followers moving back to Sg Setulai, is similar to that of PW1. He had also testified as to how he had inherited three parcels of ancestral land from his parents and grandfather in F Sg Setulai. To corroborate his testimony, PW2 produced an 'authorised document' (exh P6) signed by his parents on 30 April 1981, directing him to be responsible for and giving him ownership to the lands all situated at Sg Mirah and the rubber planting scheme stated in exhs P3, P4 and P5 (which are three acceptance letters issued by the Department of Agriculture, Miri to G his parents and grandfather). The 'authorised document' states that the location of the land is within the area of native land at Setulai, Selezu, Sebauh. He had, since the age of 5, helped his parents to work on the land and have been taking care of the lands which were planted with rubber and fruit trees.

H

[28] The 'acceptance letter' according to PW3 can only be issued by the Agriculture Department to natives with NCR. This claim is confirmed by PW10 who is a senior agricultural officer attached to Sebauh Agriculture Department since 20 April 1987. He is a subpoenaed witness and prima I facie, an independent witness.

[29] PW8, Balok ak Boah, is the daughter of one Boah Ak Igoh who is alleged to have reached an agreement with the first defendant in respect of compensation to be paid for damaging her crops. This agreement is evidenced

in pp 16–19 of exh A (laporan kebun/tanaman) which is a record of all the damaged crops on her father's NCR lands. She also testified that she had given the original copy of the record to the second plaintiff for the purpose of this trial but it was stolen in the Kuching court car park compound. These records were never challenged by the defendants which they could have easily done by calling a witness from the company. PW8 also testified that she has helped in the cultivation of several parcels of lands and hence knows the where about of the land. It is within her knowledge that the residents of the longhouse communities in Sg Selezu and Sg Setulai have NCR lands.

[30] PW11, Musung ak Gasan, is a farmer residing at Rumah Unggang, Sg Setulai, Sebuah. He was given 15 acres of land by his father in law TR Unggang Ak Ta as 'Pemai' (gift) when he married Siah ak Unggang. The land was originally planted with rubber, 'Getah Sarawak' and fruit trees. After he found out that 'Getah Sarawak' was unproductive he applied for subsidy from the Agricultural Department in Sebauh to replant trees. His application was approved as evidenced by exh P14. When his crops were distroyed he lodged two police reports and complained to the local member of Parliament.

(b) *Selezu longhouse communities*

[31] PW4, TR Tuah ak Imbang is the headman of RH Tuah, Sg Selezu, Sebauh. In support of his claim for NCR for the lands he owns he produces two rubber tickets which were issued to his grandfather Ajut ak Rentai and his grand uncle Atah ak Rantai for two parcels of land at Sg Selezu measuring three acres each. These tickets are dated in the 1940s. These two parcels of land were inherited by PW4's father and before he passed away he gave the two rubber tickets to PW4 which according to their custom meant that PW4 inherits the lands. He still cultivates on these two parcels of land. Apart from these two lands, he had also inherited three parcels of ancestral land in Sg Asau measuring ten acres each which were planted with fruit trees, rubber and pepper and from 1991 onwards on the encouragement of the Agriculture Department of Sebauh they were planted with pepper vines. This was done by PW4's father as evidenced by p 7 exh A — 'Borang Nasihat Pembayaran' which was given to PW4 by his father. Both PW4 and his father had also been successful in their applications for subsidies from the Agriculture Department under the 1998 subsidy scheme.

[32] Apart from the above ancestral lands PW4 had also inherited:

(a) two parcels of land at the swampy part of Sg Selezu measuring three and five acres respectively which are planted with wet padi; and

(b) three parcels of land at Ulu Sg Setulai measuring four acres each which were planted with fruit trees and padi, were bulldozed by the first

A defendant company and are now planted with oil palm. No compensation was paid by the company.

[33] He is also aware of the whereabouts of all his ancestral lands as he had been helping his family in cultivating the lands since the age of seven as it is
B the custom and practice of their race that the children would help their family. His testimony is challenged by the defendants that he had not produced any letters of administration to prove that he had inherited the lands.

C **[34]** PW6, Amping ak Ansi, testified that he inherited two parcels of ancestral lands from his father. These two parcels of land are a three acres rubber garden at Bukit Engkelitit and 25 acres land at Ulu Sg Setuan. As proof of his ownership of the three acres, PW6 produces a copy of 'acceptance
D letter' issued by the Department of Agriculture Miri dated 21 October 1963 (pp 24–25 exh A). The original copy unfortunately was stolen from the car of his counsel in a break in at the car park compound of the Kuching court complex. For the 25 acres, he produced the approval card with the title 'rubber planting scheme' dated 18 July 1978 (pp 26–27 exh A). Apart from
E the two parcels of land, PW6 also inherited two other parcels of land and they are:

(a) a parcel of land at Tanah Mulong, measuring about 15 acres, planted with mulong and fruit trees; and

F (b) a parcel of land at Tanah Balai, measuring about four acres, planted with rubber trees and fruit trees.

[35] Also as with other witnesses, PW6 had as a young boy helped his father in the cultivation of the ancestral lands and is fully aware that apart
G from his family, other families in the longhouse communities in Sg Selezu own NCR lands in that area.

[36] PW7, Telu ak Igoh, had inherited 14 parcels of land from his late father Igoh ak Ujoh, one of which at Ulu Asau had been encroached by the
H first defendant and no compensation had been paid. This witness is 70 years old and had worked on the inherited lands and was able to describe the locations of the lands. It is also his testimony that residents of the longhouse communities in Sg Selezu have NCR in that area.

I **[37]** PW12, TR Agi ak Bungkong, the headman of Rumah Agi in Selezu, testified on the historical background of the longhouse communities in Selezu as orally related to him by TR Mat ak Madang and her mother Gendat ak Egoh. The full details are contained in exh PW12A. In essence, the people of Selezu are the descendants of TR Tadong ak Kudie and his followers who

migrated from Engkari, Lubok Antu. His great grandfather Ujoh ak Kudie, was a renowned Iban warrior in Sg Selezu. There the people in Sg Selezu built their longhouse at Sg Kemati, which was their oldest longhouse settlement site, a sacred site known as Tembawai Kudie or Tembawai Tinting Ulu. TR Tadong ak Kudie was buried at Pendam (burial site) Selaing Ulu and he was succeeded by TR Resa ak Telajan. During TR Resa ak Telajan's tenure, the Japanese came and ordered all the Ibans in Sg Selezu to be re-settled at Labang, Ulu Batang Kemena. After the Japanese had left, they returned to Sg Selezu and constructed their longhouses near to Tembawai Subung. The group then moved to Tembawai Angat and later on at Selaing Baru before they settled at Tembawai Kebulap. During the tenure of TR Madang ak Kambut, he had led his people to battle with the Upi people and the Setulai people, over land. The boundary dispute with the Upi people (under the leadership of TR Alin and later TR Bedidi) was settled and agreed upon by the parties. This is evidenced by exh 8(c) as the map produced to show the demarcation of land of the people of TR Madang and TR Bedidi.

[38] As proof of their activities in the Sg Selezu, PW12 produced a card issued by the Agriculture Department approving his application for rubber planting scheme subsidy to plant 'Getah Malaya' on his land at Ulu Sg Keras. He also testified that he also has other ancestral lands which are planted with 'Getah Sarawak'. As further proof he referred to p 72 of exh A, a letter 'Pengesahan Skim Bantuan Subsidi Getah' issued by the Jabatan Pertanian Daerah Kecil Sebauh to confirm that he has benefited from the department's rubber subsidy scheme in 1995, planting 450 'Getah Kahwin' rubber trees at his land at Sg Kebulap. As a result of the damage done by the first defendant he had lodged a police report.

(c) *Sepadok longhouse communities*

[39] PW13, Ulis ak Sait, is a resident of Rumah Madel, Sg Sepadok, Sebauh and was born there. When at Rumah Gerringi, he was the tuai rumah. In his statement/evidence (exh PW13A), he said that he had lodged a police report against the contractor of the first defendant for damaging the fruit trees on his 12 acres land given to him by his late father Sait ak Saban. As a result of the police report, a meeting was held between him and the manager of the first defendant, Tuan Gaffar, to discuss compensation for the damage. However no agreement could be reached as the offer by Tuan Gaffar was to pay 'Pemali Menoa' in the sum of RM500 and 'menceroboh tanpa kebenaran' or 'Pemali Umai' RM304.

[40] PW13 also testified that he has two other parcels of ancestral land. One of the lands is inherited by PW13 from his mother Andang ak Chagek who was given the same by Mail ak Nyagaw, the brother of PW13's grandmother. Mail ak Nyagaw had no children which explained the reason

why the land was given to PW13's mother. As proof of ownership, PW13 produced as evidence the original copy of the 'licence to replant' which was issued to Mail ak Nyagaw on 20 March 1941 — exh P21. This document was given to PW13 when his father passed away sometime in 1996. The other parcel of land measuring about two acres at Sg Sepadok was given to him by his mother who also got the land from Mail ak Nyagaw. Mail ak Nyagaw had applied for the land and the receipt of the application for the land which was issued to Mail ak Nyagaw on 7 December 1940 was produced and marked exh P22(a)–(b). However there is no encroachment by the first defendant on these two parcels of lands.

[41] PW14, Seka ak Awang of Rumah Madel, Sepadok, as proof of ownership of a piece of land in Sepadok produced to the court a land title — the Bintulu District (sub district — Sungai Sepadok) lease of Crown Land No 3680 which was issued to replace OT No 643 originally registered in the name of Awang ak Kandaw, marked as exh P23. Awang ak Kandaw is PW14's late father. The lease of Crown Land No 3680 which was issued to replace OT No 643 was dated 3 August 1950, hence the only conclusion here is that the occupation ticket was issued prior to 1950. As such, counsel for the plaintiffs contends that it meant that PW14's father was in occupation of the land before 1950.

[42] Apart from the above land, PW14 also has two other parcels of NCR lands which were given to her by her late father who had cultivated them. She had continued that cultivation up to the present day. These two parcels of land however were not encroached by the defendants.

[43] PW15, Ernest Dana Dian, was born in Sungai Mang, Sepadok, when their longhouse community was under the leadership of TR Kandau ak Dundang. The details of his evidence is in exh PW15A. One of the lands in question (evidenced by a copy of Bintulu District Occupation Ticket 645 — exh P24(a)-(b)) belongs to his wife Siah ak Laga who had been given the land by her parents. This land is planted with rubber trees and fruit trees by PW15's father in law. PW15 also testified that he has two other parcels of NCR land which were given to him by his father in law, Langa ak Kandau as 'Pemai' (a gift, heritage) when he married Siah ak Laga. However these two parcels of land were not encroached upon by the first defendant. These lands are located within the 'pemakai menoa' of the people of Sungai Sepadok.

[44] PW16, TR Madel ak Kandou, is a 75 years old village headman of Rumah Madel, Sepadok who was appointed headman by all the villagers in 1996 with 30 families under his jurisdiction. The historical background of the Sepadok community is made known to him by his grandfather Dundang

ak Busang and his father Kandau ak Dundang. The original inhabitant who settled at Sg Sepadok Bintulu was his grandfather Dundang ak Busang, who originally came from the second division long before the Japanese occupation in Sarawak. After TR Dundang died at Tembawai Tinting, Sungai Bukai before the Japanese occupation, he was succeeded by his son Kandau ak Dundang, who brought his followers to move to Nanga Stop. Besides continuing to farm in Sg Bukai and Sg Mam area, the people started to farm at and around Kakat, Bau, and Sebelenggang. TR Kandau ak Dundang and his followers again moved down the Sepadok river and settled at Sungai Mam, which is also known as Tembawai Lepong. The villagers only settled at Sungai Mam for nine years as life was difficult and not peaceful.

[45] It was at Sungai Mam that the Japanese invaded. PW16's ancestors were heavily attacked by the Japanese at Sungai Rangkai and because of the bombing, Sungai Rangakai is also known as Sungai Bom. TR Kandau and his followers again moved further down the Sepadok river and settled at Sungai Mang. PW16 testified that he was about ten years old during the Japanese occupation. After staying at Sungai Mang for a number of years, the longhouse folks moved to resettle at Sungai Bukai in or around 1955.

[46] While at Sg Bukai, Geringgi ak Ingong was appointed as the headman and PW16 as his assistant, replacing TR Kandau ak Dundang who was then very old. TR Geringgi is PW16's brother in law. TR Kandau ak Dundang died in 1963 at the longhouse of Sungai Bukai.

[47] There were about 42 families under TR Geringgi ak Ingong. In 1997, the Sepadok longhouse community decided to split themselves into five groups. TR Geringgi and his group continued to occupy the settlement at Sungai Bukai while the other four groups moved to their present settlements near the Sebauh-Bintulu Road: TR Berendak ak Sap and his followers moved to Sungai Kajangan; TR Linggi ak Enteba and his followers also moved to Sungai Kajangan; TR Francis Tungkat ak Mering and his followers moved to Ulu Sungai Sepadok; while PW16 led his followers to settle at Seberai Nanga Sungai Lobang.

[48] He further explained that the territorial boundary is the perimeter boundary between one kampong with another kampong.

[49] PW16 clarified that within the 'pemakai menoa' there are tembawai, graveyards, pulau galau, fruit trees and others.

[50] PW16 said that the territorial boundary between Sepadok and Setulai starts from Sg Stong and ends at Bukit Bindang. From there, it stretches to Pulau Marai, Paya Tekat, Ulu Sungai Mang, Ulu Mam, Ulu Sg Bau, Ulu Kumut, Ulu Kejangan, Ulu Sepadok, Langkau Kijun, Bukit Lajek and ended at Tinting Bukit Lajek. These landmarks are the boundary marks between Sepadok and Setulai. PW16 also testified that he has numerous parcels of NCR land with the pemakai menoa of the Sepadok communities, none of which had been encroached by the first defendant. Some of the lands are inherited from his late father. He had also produced various copies of 'rubber planting scheme' which was used for application for subsidy in the 1970s when the Agriculture Department gave out subsidies to plant 'Getah Malaya'. He also produced a 'surat penerima wang' bearing No 4911 which he said was kept together with Occupation Ticket No 925. These documents, according to PW16, are evidence that they have resided in Sg Sepadok a long time ago.

THE DEFENDANTS' CASE

[51] The defendants had called two witnesses, namely, Stephen Ling Jin Huat ('DW1') and Ajmaen bin Superi ('DW2').

[52] DW1 is an assistant photogrammetry officer of the Photogrammetry section, Survey Branch of the Lands and Surveys, Department Sarawak and was called to interpret some aerial photographs. The defense of the defendants basically is that NCR can only be created by 'Temuda' which is a process whereby virgin jungle was cleared for farming and occupation by natives.

FINDINGS OF THE COURT ON THE ISSUES

[53] Let me firstly say that it can be said that the evidence of the witnesses whom I have mentioned earlier are self serving as they are what I call witnesses with interest as they are the plaintiffs. For me to determine whether their evidence is credible I look for objective evidence in the form of documents and evidence from witnesses with no interests, in that they do not gain from the outcome of this case.

DOCUMENTARY EVIDENCE

[54] I start off with the documentary evidence in the form of letters issued by the Agriculture Department approving subsidies under the subsidy scheme.

[55] PW10 is a subpoenaed witness and is presently working as a senior agricultural officer attached to the Sebuah Agriculture Department since 20 April 1987 and his duties are both administrative and agricultural extension. Of significance is his evidence that he confirmed that only those who have NCR can apply for subsidy under the Agriculture Department subsidy scheme. As corroboration, he produces in court three planting registers which are:

(a) exh P13 — Sebauh sub-district new planting register. It is a record of new rubber planting scheme since 1958–1968;

(b) exh P15 — This one is application for new planting and re-planting of rubber scheme since 1976–1985;

(c) exh P14 — The rubber planting scheme new planting from 1965–1971 is a record of new rubber planting scheme since 1965–T1971.

[56] The Agriculture Department (Sebauh sub-district) jurisdictional territory covers Setulai and Selezu longhouse communities, but not the Sepadok longhouse communities which is under Bintulu Agriculture Department's jurisdiction. Hence PW10 knows the families of Selezu and Setulai longhouse communities who are recipients under Agriculture Department's rubber planting and re-planting schemes. He also testified that for application for subsidy, the application form must contain a certification that the relevant lands are NCR land signed either by tuai rumah, ketua kampung or penghulu. As for the rubber tickets, his testimony can be seen from this part of the notes of the proceeding:

Q Do you know whether they were rubber subsidy schemes being carried out before those recorded in Exhs. P13, P14 & P15?

A The records I have is since 1958. Before 1958, there were rubber project given by the British Government in 1920's, 1930's, 1940's & 1950's. They called it Getah Sarawak. In 1958, they called it Cronal seedlings also called Getah Malaya. For Getah Sarawak, the farmers were given a sort of card, they called it Rubber Ticket or Rubber Card. I obtained these information from my senior officers and also from Lembaga Getah Malaysia.

Q Have you seen a rubber ticket or rubber card before?

A Yes.

Q Refer to pages 3 & 4 and 5 & 6 of Exh. A. Are these the rubber ticket or rubber card you referred to?

A Yes.

[57] With this testimony, I agree with counsel for the plaintiffs that rubber tickets had been in existence and issued for rubber projects given by the British Government in 1920s–1950s.

[58] PW3, Victor Udang Jeliang, a former Sarawak administrative officer of Sebauh produces to the court two documents, one relates to a decision of the native court in the district of Sebauh and the other one is a record of a dispute of the boundary of Pemakai Menua between TR Agi and TR Sada at Sg Selezu adjudicated by Penghulu Abok.

[59] PW9 was subpoenaed to testify. By virtue of his service in the government service as Sarawak administrative officer, resident, chief registrar of the native court and Deputy President of Majlis Adat Istiadat, in my view, he can be treated as a person who is familiar with the affairs of Iban in the area where he had served which includes the area of Sepadok. In court he produces a document from Bintulu resident's office indicating the pemakai menoa of Sepadok and it states as follows:

> The pemakai menoa of Rumah Geringgi Sepadok, Bintulu is bounded by a boundary starting at a point on the true right bank of Batang Kemena opposite the mouth of Sungai Itok, thence following the watershed of Sepadok/Segiau then to Bt Lajek then straight to Bt Takuja, then following the watershed of Sepadok/Stulai then to the boundary of Selezu Forest Reserve, then turns westwards to Kuala Sg Setong, then follows Sg Sepadok right to the river mouth of the said river (p 38 of exh A).

[60] He also testified that there is a map of the boundary and in fact challenges the defendants indirectly during cross examination that the map can be obtained from the Resident's office. This is how he put it in his cross examination:

> Q You mentioned that you relied on the map kept in the Resident and District Office, besides the statements made by Tuai Rumah Geringgi and the penghulu. Do you have the map with you?
>
> A I don't have the map with me now as I am no longer in the service. But it could be obtainable from the Resident and District Office.
>
> Q Can you recall and describe what that map is?
>
> A That map is about the extent of Pemakai Menua of Rumah Beringgi Sepadok. It defines the territorial resource area or the Pemakai Menua of that longhouse community. Included within this territorial resource area of Pemakai Menua are the NCR land like Temuda, longhouses site and ex-longhouses site, burial grounds, rivers, forest reserve, which confer rights and privileges to the members to the longhouses community. Each Iban longhouse has Pemakai Menua and it is not possible for the legally constituted Iban longhouse community to be without the Pemakai Menua.

This Pemakai Menua has been constituted and created by the pioneering migrant leaders by way of the ritual ceremony called Panggol Menua and they are recognized by the neighbouring communities. The rights and privileges within this territorial resource area or Pemakai Menua can only be held by the members of the longhouse community. So the rights and privileges are therefore exclusive. The Temuda rights or rights to the NCR land can be only be lost through extinguishment under Section 5 (3) of the Land Code or prolong non-user, abandonment and migration without approval by the Tuai Rumah, penghulu or the Government i.e. unauthorized migration.

Q You explained Pemakai Menua as territorial resource and then you explained Temuda rights as right to the NCR land. Can you be more specific of the difference between Pemakai Menua and the Temuda rights?

A Pemakai Menua is the geographical extent of the territory of each longhouse. Within this specific area, there exist NCR rights to land like Temuda that is farming land, cultivation such as rubber garden, fruit trees, burial grounds, longhouse sites and ex-longhouse i.e. Tembawai, forest islet or pulau inclusive of Pulau Galau, Pulau Mali that is all reserve or all forest stands created under custom. The purpose of this pulau is to be a source of trees for domestic use, such as timber, rottan, material for padi bins (made of the tree barks, fashioned in a circular manner to contain padi after harvest), and material for making boats. This Pemakai Menua is inclusive of forest are also sources of collection of jungle produce such as fern, bamboo shoots and other edible produce. This Pemakai Menua defines the jurisdiction of each Tuai Rumah and it is this jurisdiction that is the extent of the local jurisdiction of Tuai Rumah as defined or implied under Section 7 of the Native Court Ordinance 1992. Without the concept of Pemakai Menua, there would be no clear definition and extent of the local jurisdiction of the Tuai Rumah as the presiding officer of the headman Court in the Native Court system.

Q What about Temuda?

A Temuda is held under NCR. It is created under Section 5 (2) of the Land Code i.e. it must be created before 1st January 1958 by way of clearing and occupation, by way of planting and cultivation or under Section 10 of the Land Code, that is last time it was approved by the District Officer but now approve by the Superintendent of Lands & Surveys and by way of communal reserve, approve by the minister. This NCR land was created by way of felling of the primary forest by the original workers of our ancestors and the rights of use is transferred to subsequent generation as its name suggest, it is an untitled land which could be lost in the manners that I had mentioned earlier i.e. non-user, unauthorized migration, abandonment and extinguishment. It is a common practice under the custom of shifting cultivation for this Temuda land to remain idle in accordance of fallow system use to maximize land fertility and enhancing maximum use. The length of this idle period within the fallow system is contingent on the nature of the fertility of the land. The more fertile the land is, the shorter will be the idle period. The less fertile the land is, the longer will be the idle period.

Q You just described the creation of Temuda under the civil laws. Does the Iban's custom and tradition allow the creation of Temuda?

A Yes, in fact the creation of Temuda or NCR land are created under custom, that is it was created by our ancestors prior to 1st January 1958. That is why in the land code 1958 (Cap. 81) Section 5 (2) (f), says any other lawful means. The definition of customary law is custom or body of custom to which the law of Sarawak gives effect (Section 2 of the Native Court Ordinance 1992).

B Q Are you aware if there is or are instances of longhouses sharing the same Pemakai Menua?

A Yes, it is quite common. This happened when the first pioneer longhouses started with one longhouse. Subsequently, because of the increase of the number of 'bilik' or 'bilik' families it is quite natural and normal for the people to build a new C longhouse or additional longhouses. Hence from the original one longhouse, they may build more longhouses. As I said earlier, the Pemakai Menua or the extent of Pemakai Menua is determined by the ritual ceremony of Panggol Menua. The original longhouse and the consequent longhouses will therefore share the same territorial resource area.

D

[61] His testimony as to why he issued p 38 of exh A (in his capacity as resident of Bintulu, outlining the boundary of the pemakai menoa of Rumah Geringgi Sepadok, Bintulu), in my view, was not damaged at all by cross-examination. In fact he had given credible reasons why he had issued it. E He is what I call a witness with no interest as he is not affected by the outcome of the case. Hence his evidence should be given credence unless the defence gives reasons why he should not be treated in this manner.

F **[62]** PW19, Mamat ak Laga, an officer attached to the Bintulu Agricultural Department was subpoenaed and he produced in court records of application for subsidies for pepper planting and rubber planting scheme.

[63] What I have set out are evidence of independent witnesses and G documentary evidence which, in my view, had corroborated the plaintiffs' case. These evidence are good corroborative evidence which have been defined by Raja Azlan Shah FJ (as His Highness then was) in *Karthiyayani & Anor v Lee Leong Sin & Anor* [1975] 1 MLJ 119 as follows (at p 120):

H In my judgment, the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly appreciated. It is settled law that a person cannot corroborate himself but it would appear that s 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former I statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under s 157 is admissible as

corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. *If a witness is independent, ie, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted.* If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. The nature and extent of corroborative evidence is a factor which should have been weighed by the learned judge. But as far as I can see, he did not mention it. (Emphasis added.)

[64] To recap, the plaintiffs' evidences in a nutshell have been corroborated by the oral evidence of the independent witnesses and the following documentary evidence:

(a) Setulai Longhouse

Exhibit No.	Description of Exhibit	Produced by
P1	Surat Perjanjian — agreement between TR Bandang Pili and the Malay community at Sg. Segam in the presence of the then district officer on 8.7.1946	PW1, TR Bilong Ak Anssi
P3, P4, P5,	3 Acceptance letters issued by Agriculture Dept, Miri to PW2's parents and grandparents	PW2, Herman Unjah ak Ramba, Rh Belongs
Exh. A pg 16–19	'Laporan Kebun/&Tanaman — Agreement with the 1st def in respect of compensation to be paid for damaging PW8's crop	PW8, Balok ak Boah
P14	Agri Dept's approval of PW8's application to replant rubber trees	PW11, Musung ak Gasan, Rh Unggang

(b) Selezu Longhouse

Exhibit No.	Description of Exhibit	Produced by
	2 rubber tickets dd in the 1940s	PW4, TR Tuah ak Imang
Exh. A pg 7	'Borang Nasihat Pembayaran' from Agri. Dept. for planting pepper vines.	PW4, TR Tuah ak Imang
	Application for subsidies	PW4, TR Tuah ak Imang
Exh. A pg 24–25	Acceptance letter issued by Agri. Dept. dd 21.10.63	PW6, Amping ak Ansi
Exh. A pg 26–27	Approval card 'Rubber Planting Scheme'	PW6, Amping ak Ansi
PW12A	Historical background of longhouse in Selezu	PW12, TR Agi ak Bungkong, Rh. Agi
8(c)	Map demarcating land of TR Madang and TR Bedidi	PW12, TR Agi ak Bungkong, Rh. Agi
	Card issued by Agri. Dept for Rubber Planting Scheme Subsidy	PW12, TR Agi ak Bungkong, Rh. Agi
Exh. A pg 72	'Pengesahan Skim Bantuan Subsidi Getah'	PW12, TR Agi ak Bungkong, Rh. Agi

(c) Sepadok Longhouse

Exhibit No.	Description of Exhibit	Produced by
P21	Licence to replant	PW13, Ulis ak Sait, Rh. Madel
P22(a)	Receipt for application of land	PW13, Ulis ak Sait, Rh. Madel
P23	Land title — Lease of Crown Land No. 3680 dd 3.8.50 to replace O.T. No. 643	PW14, Seka ak Awang, Rh. Madel
P24 (a)-(b)	Bintulu District Occupation Ticket 645	PW15, Ernest Dana Dian, Sg. Mang, Sepadok
	Surat Penerima Wang No. 4911 attached with Occupation Ticket No. 925	PW16, TR Madel ak Kandou, Rh Madel

Hence, I hold that the evidence of the plaintiffs to be credible unless good reasons are advanced by the defendants to show otherwise.

[65] This brings me to the defendants' case. To neutralise the evidence of the plaintiffs the defendants relied on the topography maps produced by DW1 whose evidence was used by counsel for the defendants to contend that NCR can only be created where there has been a clearance of virgin jungle. The crucial part of his evidence is this:

> Q: How do you determine from the aerial photograph whether the section is primary forest or not?
>
> A: By way of the Lands & Surveys criteria in determining the age of trees which I have said earlier.
>
> Q: By reading the maps, how did you know the age, the height of the trees?
>
> A: Time, pattern, shape, size texture of the photograph images.
>
> Q: Can you give an example?
>
> A: Look at Exhibit D1 (a). The darker tone in the aerial photographs show the primary forest whereas the lighter tone shows the lands had been cleared.

[66] Before I deal with the contention of counsel for the defendants, I need to deal with the objection of counsel of the plaintiffs against the admission of the aerial photographs as intimated to counsel during trial. The grounds of objection are simply that:

(a) the plaintiffs were never supplied with those aerial photographs during discovery;

(b) the aerial photographs were attached to the witness statement of DW1 when he was about to give evidence in court;

(c) at that stage the plaintiff had closed their case; and

(d) it had thus deprived them of the opportunity to rebut those photographs.

[67] O 24 of the Rules of the High Court requires parties to make mutual discovery of relevant documents which are in their possession and the time to do this is after the close of pleadings. This is a 2001 case and the trial only commenced in 2008 leaving the parties some six years to exchange whatever documents they have in their possession. The documents in dispute are the aerial photographs of the relevant area which by any stretch of imagination are not only relevant but crucial to the both the defendants' and the plaintiffs' case. Hence they are documents which must and should have been disclosed

to the plaintiffs at the earliest opportunity. No explanation had been given for this omission and the court can only guess. In deciding whether I should sustain the objection, it is a matter of me choosing the liberal approach or the modern litigation approach. The liberal approach is what was done by Bowen LJ in *Cropper v Smith* (1884) 26 Ch D 700 and this is what he said:

> Now, I think it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself, and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace.

[68] Bowen LJ's principles are followed and adopted in Australia High Court in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146. Their Honours said:

> Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times, that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim ... Justice is the paramount consideration in determining an application such as the one in question. Save in so far as costs may be awarded against the party seeking the amendment, such an application is not the occasion for the punishment of a party for its mistake or for its delay in making the application. Case management, involving as it does the efficiency of the procedures of the court, was in this case a relevant consideration. But it should not have been allowed to prevail over the injustice of shutting the applicants out from raising an arguable defence, thus precluding the determination of an issue between the parties.

[69] There appears to be a change of above approach resulting in a move to the modern litigation approach. In the recent case of *Aon Risk Services Australia Limited v Australian National University* (2009) HCA 27 — 5 August 2009 the Australian High Court departed from *JL Holdings*'s case and made 'concerns of case management' a primary consideration in determining whether leave to amend pleadings ought to be granted. French CJ in discussing this issue stated the following:

The Judicature Acts and associated Rules of Court are reflected in rr 501 and 502 of the ACT Rules. The ACT Rules, like their precursors, confer the discretion to give leave to amend and impose the duty to make amendments for the purpose of deciding the real issues in, and avoiding multiplicity of, proceedings. The discretion is exercised in the context of the common law adversarial system as qualified by changing practice. But that is not a system which today permits disregard of undue delay. Undue delay can undermine confidence in the rule of law. To that extent its avoidance, based upon a proper regard for the interests of the parties, transcends those interests. Another factor which relates to the interests of the parties but transcends them is the waste of public resources and the inefficiency occasioned by the need to revisit interlocutory processes, vacate trial dates, or adjourn trials either because of non-compliance with court timetables or, as in this case, because of a late and deliberate tactical change by one party in the direction of its conduct of the litigation. These are matters which, even under the Australian versions of the Judicature Act system, unaffected by the sequelae of the civil procedure reforms of 1998 in the United Kingdom, are to be regarded as both relevant and mandatory considerations in the exercise of the discretion conferred by rules such as r 502.

Recognition of the public interest in the administration of civil justice procedures in Australia and the United Kingdom pre dates the *Woolf Report* and its attendant reforms. In *Dawson v Deputy Commissioner of Taxation*, King CJ acknowledged the responsibility of judges to ensure, 'so far as possible and subject to overriding considerations of justice', that the limited resources which the state commits to the administration of justice are not wasted by the failure of parties to adhere to trial dates of which they have had proper notice. In a late amendment case considered by the House of Lords in 1987, there was a marked departure from the approach of Bowen LJ in *Cropper v Smith*. Lord Griffiths required that judges considering amendments weigh in the balance:

> the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently.

The same indulgence could not be shown towards the negligent conduct of litigation as might have been possible in a 'more leisured age'. That approach was followed by Sheppard J in a revenue case heard in the Federal Court. And in the New South Wales Court of Appeal in *GSA Industries*, Samuels JA said that:

> the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's cave which Lord Reid rejected as one of the fairy tales in which we no longer believe.

The approach reflected in these authorities was applied by a majority of the full court of the Federal Court in *Bomanite Pty Ltd v Slatex Corp Aust Pty Ltd*.

Sali v SPC Ltd was concerned with a refusal by the full court of the Supreme Court of Victoria to grant an application for an adjournment of an appeal. By majority, this

court held that in the exercise of a discretion to refuse or grant an adjournment, the judge of a busy court was entitled to consider 'the effect of an adjournment on court resources and the competing claims by litigants in other cases awaiting hearing in the court as well as the interests of the parties'. Brennan, Deane and McHugh JJ went on to say:

> *What might be perceived as an injustice to a party when considered only in the context of an action between parties may not be so when considered in a context which includes the claims of other litigants and the public interest in achieving the most efficient use of court resources.* (Emphasis added.)

[70] Gummow J, Hayne J, Crennam J Kiefel J and Bell J in a joint judgment said:

> An application for leave to amend a pleading should not be approached on the basis that a party is entitled to raise an arguable claim, subject to payment of costs by way of compensation. There is no such entitlement. All matters relevant to the exercise of the power to permit amendment should be weighed. The fact of substantial delay and wasted costs, the concerns of case management, will assume importance on an application for leave to amend. Statements in *JL Holdings* which suggest only a limited application for case management do not rest upon a principle which has been carefully worked out in a significant succession of cases. On the contrary, the statements are not consonant with this court's earlier recognition of the effects of delay, not only upon the parties to the proceedings in question, but upon the court and other litigants. Such statements should not be applied in the future.
>
> A party has the right to bring proceedings. Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.
>
> *In the past it has been left largely to the parties to prepare for trial and to seek the court's assistance as required. Those times are long gone. The allocation of power, between litigants and the courts arises from tradition and from principle and policy. It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.*
>
> Rule 21 of the Court Procedures Rules recognises the purposes of case management by the courts. It recognises that delay and costs are undesirable and that delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants. The Rule's objectives, as to the timely disposal of cases and the limitation of cost, were to be applied in considering ANU's application for amendment. It was significant that the effect of its delay in applying

would be that a trial was lost and litigation substantially recommenced. It would impact upon other litigants seeking a resolution of their cases. What was a 'just resolution' of ANU's claim required serious consideration of these matters, and not merely whether it had an arguable claim to put forward. A just resolution of its claim necessarily had to have regard to the position of Aon in defending it. An assumption that costs will always be a sufficient compensation for the prejudice caused by amendment is not reflected in r 21. Critically, the matters relevant to a just resolution of ANU's claim required ANU to provide some explanation for its delay in seeking the amendment if the discretion under r 502(1) was to be exercised in its favour and to the disadvantage of Aon. None was provided. (Emphasis added.)

[71] Having given due consideration to the issue at hand, I am in favor of the modern litigation approach and adopt the reasons given by Their Honours. If I may add here that in this day and age where legal research and for that matter any information can be obtained with a click of button on a lap top from anywhere in the world, there is no reason why litigation cannot be conducted in an efficient manner as demanded by public interests. Counsels must note that they not only have a duty to their client, they also have a duty to the court which is paramount and in the context of what we are discussing he or she must ensure that all documents which are relevant to his or her cause are disclosed to the opposing side at the earliest opportunity. Only by adhering to this duty can the court be able to dispose of the case in an efficient manner.

[72] I am fully aware of the fact that the case I just referred to concerned an application for amendment of pleadings and court rules of another jurisdiction.

[73] The principles of efficient case management as set out in the above cases, in my view, are applicable to the facts before me. In fact, r 21 of the Court Procedures Rules states the purpose of the Rules in these terms:

(1) The purpose of this chapter, and the other provisions of these rules in their application to civil proceedings, is to facilitate the just resolution of the real issues in civil proceedings with minimum delay and expense.

(2) Accordingly, these rules are to be applied by the courts in civil proceedings with the objective of achieving —

(a) the just resolution of the real issues in the proceedings; and

A (b) the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

(3) The parties to a civil proceeding must help the court to achieve the objectives.

B (4) The court may impose appropriate sanctions if a party does not comply with these rules or an order of the court.

[74] What is stated there is applicable in this jurisdiction as well in that there is common ground between the two jurisdictions and that is the C litigants through their counsel have a duty to ensure that cases are disposed off in timely manner. Here the defendants should have but did not disclose the aerial photographs to the plaintiffs well before the trial. Counsel for the plaintiffs could have applied for an adjournment to analyse the photographs, and the court would have no reason not to grant it and that would have D further delayed the case for another period. By not disclosing the photographs until the very last moment in my view amounts to a breach of that duty which cannot be left unpunished otherwise the court will be seen as condoning such conduct of litigation. By breaching that duty, they had deprived the plaintiffs the opportunity to analyse the photographs which no E doubt had prejudiced their case. Counsel for the defendants in re-examination of DW1 attempted to justify their late disclosure of the photographs by eliciting evidence from DW1 to the effect that the aerial photographs are 'state secret' and cannot be released except with the approval of the state secretary and the police. Again with respect, they have not laid F any foundation to say that the aerial photographs are state secret and to do that they have to call the appropriate witness. If what counsel contends is correct then the plaintiffs in all NCR cases will have an insurmountable mountain to climb. That is repugnant to justice and cannot be the law. In any event, the fact that they were used in this trial means that they are not state G secret because secret means exactly that — secret.

[75] In the circumstances, I rule that the aerial photographs, though had been admitted earlier, cannot be taken into account in my deliberation. The fact that the plaintiffs did not ask for an adjournment is of no relevance to H my consideration.

[76] Further there are other reasons why the aerial photographs should not be admitted and they are these. No foundation was laid by counsel or the

I

defendants as to how the photographs came into existence. It was only in cross-examination that DW1 said that the Royal Air Force took them. DW1 also in his written statement described how such photographs are taken especially the instruments used. With respect to counsel, personnel from the Royal Air Force should have been called to testify to the fact that they were commissioned to take these photographs and the manner in which they were done. DW1 is not the appropriate person to testify those facts as he was only interpreting the image appearing in the photographs. The court must ensure that the aerial photographs are accurate in the first place and the only way to do that is by calling the relevant personnel from the Royal Air Force which I have no doubt would have written record of jobs commissioned by the government. The written record will undoubtedly show at least the location in which the photographs were taken. With that missing information the defendants had not established the authenticity of the aerial photographs.

[77] However in the event that I am wrong in not admitting the aerial photographs as evidence, I will now consider whether they had advanced the defendants' cause. To recap, the contention of the defendants is basically that NCR can only be established by Temuda which involves the clearing of virgin jungle and the evidence of DW1 set out earlier is relied on. With respect, it is incorrect to say that NCR can only be created by Temuda. As I said earlier NCR is created by custom and tradition of the natives. In this case NCR is created by pemakai menua which had been clearly explained by PW9 and PW10. Their evidence was never challenged and the court accepted them without reservation. That being the case the use of aerial photographs to disprove claims of NCR is inadequate to say the least. I say that for the simple reason that the defendants as I have said earlier had not established the authenticity of the aerial photographs and hence the accuracy of the same. Despite DW1's expertise in reading the aerial photographs, when those photographs' accuracy has not been proved whatever interpretation of them is unreliable to say the least. This is just common sense and requires no case authority to support this principle. Furthermore, what we have here is a choice between direct evidence of the plaintiffs which I had found credible and inferences from aerial photographs. The obvious choice is the 'direct evidence' as this is just taking the common sense approach.

[78] As for the evidence of DW2, it falls foul of the rule of hearsay in so far as the surveyed map is concerned. It is DW2's evidence that the surveyed map was done by the registered surveyor of the registered proprietors of the provisional lease. The registered surveyor was not called to give evidence as to

how he came to the conclusion that only part of provisional lease has NCR claims, hence the value of the map tendered in court is minimal.

[79] Before I move to the area claimed, counsel for the defendants in their cross-examination had disputed the plaintiffs' inheritance of the NCR by contending that the plaintiffs had no letter of administration. PW10 in his testimony had testified that the manner in which natives inherited NCR lands and I have no problem in accepting his evidence as the defendants did not produce any rebuttal evidence. In any event, it is both impractical and unreasonable to require natives to apply for letters of administration when they have another system of custom and practice of inheriting ancestral lands. In any event there is no formal registration of dealings of NCR lands in Sarawak; hence requiring natives to apply for letters of administration is meaningless.

NCR AREA

[80] In proving the location of the NCR claims, PW5 was called to testify as to how he mapped the NCR area claimed by the plaintiffs. The maps produced by PW5 are exhs P7, P8, P10 and P11. PW5's qualification is set out in exh PW5 — and though not a licensed surveyor, I find him to be a competent witness in view of his experience in the field of mapping. In producing the maps PW5 had relied on the data collected by PW18 and Hydaeki Gani ak Ujai who were trained by PW5 as to how to collect the relevant data. In collecting the data, they, of course, relied on the boundary as told to them by the various communities of Sg Sepadok, Sg Selezu and Sg Setulai. Since I have found the evidence of the plaintiffs to be credible, I have no reason to doubt the veracity of data collected by PW18 and Hydaeki Gani ak Ujai. Accordingly, I accept the accuracy of the maps tendered in court delineating the boundary of NCR claims of the communities of Sg Sepadok, Sg Selezu and Sg Setulai.

ORDERS

[81] For all the reasons stated above, I make the following orders:

(a) a declaration that the plaintiffs have native title and/or native customary rights and/or usufructuary rights over lands as delineated in the area marked yellow in the map marked 'M' attached to the statement of claim (native customary rights);

(b) a declaration that the two provisional leases issued by the fourth and fifth defendants are subjected to the native title and/or native customary rights and/or usufructuary rights of the plaintiffs in or over the native customary lands;

(c) consequent to previous order, the two provisional leases are to be rectified by the fourth defendant to exclude the plaintiffs' said native customary lands;

(d) that the plaintiffs be given forthwith vacant possession of their native customary land;

(e) damages to be assessed by the deputy or senior assistant registrar in respect of fruit trees destroyed in the native customary lands;

(f) damages to be assessed by the deputy or senior assistant registrar in respect of the native customary lands which had been encroached upon by the first defendant;

(g) interest at the rate of 4%pa on the assessed damage from the date of encroachment to the date of judgment, thereafter 8%pa on the assessed damage from the date of judgment till the date of full payment of the assessed damage; and

(h) costs to be taxed unless agreed to the plaintiffs.

Plaintiffs' action allowed with costs.

Reported by Andrew Christopher Simon